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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL D. SMITH,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

KENNETH J. SEENE, as Trustee, etc.,

Real Party in Interest.

D042404

(San Diego County
Super. Ct. No. P176307)

PETITION for writ of mandate challenging orders of the Superior Court of San Diego County, William H. Kronberger, Judge. Petition denied.

Michael D. Smith challenges orders granting Kenneth Jacob Seene's motion to require Smith, as a vexatious litigant, to furnish security in pending litigation and prohibiting him from filing new litigation in propria persona without first obtaining leave

of the court in which that filing is proposed.¹ Smith contends he is not a plaintiff as defined in Code of Civil Procedure section 391, subdivision (d)² and therefore cannot be found to be a vexatious litigant. He also challenges orders relating to filing a motion for reconsideration.

FACTUAL AND PROCEDURAL BACKGROUND

On January 14, 2000, Seene, as trustee of The 1993 Seene Family Trust (Trust), filed a petition in probate court (case No. P176307) to ascertain the beneficiaries of the Trust and for resolution of a property dispute involving Trust property (Petition). After a bench trial, the court entered an order that Smith was not a beneficiary of the Trust, was not entitled to a distribution of real property from the Trust, and had no claim against the title of the Myrtle Avenue property held by the Trust (Order). On June 6, 2002, we affirmed the Order on appeal. (*Seene v. Smith* (June 6, 2002, D038049) [nonpub. opn.].) On August 21, the California Supreme Court denied Smith's petition for review.

On August 5, 2002, Smith filed a complaint against Seene in the civil division of the San Diego County Superior Court (case No. GIC 793744), alleging Seene made fraudulent misrepresentations in the pleadings and at trial of the Petition (Complaint). On January 31, 2003, the trial court sustained Seene's demurrer to the Complaint without

¹ As noted in the discussion, we treat Smith's appeal as a petition for writ of mandate because the orders appealed from are not appealable orders.

² All statutory references are to the Code of Civil Procedure.

leave to amend. On March 5, 2004, we affirmed the judgment entered in favor of Seene on the Complaint. (*Smith v. Seene* (March 5, 2004, D041752) [nonpub. opn.])

On February 24, 2003, Smith filed a petition in probate court in case No. P176307 to set aside the Order, despite its affirmance on appeal. Seene filed a section 391 motion to require Smith, as a vexatious litigant, to furnish security in that pending litigation and for a prefiling order prohibiting Smith from filing new litigation in propria persona without first obtaining leave of the court in which that filing is proposed. In that motion, Seene's attorney, James Boyd, depicted Smith as the plaintiff and Seene as the defendant in Smith's petition to set aside the Order. Seene argued that Smith was a vexatious litigant because his petition and prior Complaint attempted to relitigate a matter already determined by the Order affirmed on appeal.

At the April 22 hearing on Seene's motion, the court found Smith was a vexatious litigant and stayed proceedings on his petition to set aside the Order pending filing of a \$25,000 bond. The court stated if that security was not filed within 60 days, the petition would be dismissed pursuant to section 391.4. On April 23 the court continued the matter until July 9.

On May 6 the court issued its written order based on the April 22 hearing. The court found that Smith "is a vexatious litigant as defined in" section 391, subdivisions (b)(2) and (b)(3), and "[t]here is no reasonably probability that [Smith] will prevail in this case." Accordingly, it ordered:

"1. [Smith] is designated as a vexatious litigant as defined in . . . section 391;

"2. [Smith] shall furnish security for the benefit of [Seene] in the amount of \$25,000.00;

"3. This proceeding is stayed for sixty (60) days pursuant to . . . section 391.6 to provide [Smith] adequate opportunity to furnish the ordered security and shall thereafter, if security is not furnished, be dismissed pursuant to . . . section 391.4; and

"4. A prefiling order, as described in . . . section 391.7, shall be entered prohibiting [Smith] from filing any new litigation in the courts of the State of California in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed, with failure to first obtain leave of the presiding judge to file punishable as contempt of court."

On May 15 the court entered the prefiling order.

On May 16 Smith appeared and requested authorization to file a motion for reconsideration. He argued no prefiling order was required to file his proposed motion because the court's April 22 ruling did not include language regarding a section 391.7 prefiling order and, in any event, his motion was not new litigation. On May 19 the court denied Smith's request, noting that Seene's section 391 motion had sought and the court had awarded the prefiling order.

On June 4 the court denied Smith's request for a prefiling order allowing him to file a motion for reconsideration.

Smith timely filed a notice of appeal, challenging the court's actions on April 22, May 15, May 19, and June 4.

DISCUSSION

I

Appealability

Although neither party raised the issue, we note the prejudgment orders challenged by Smith's notice of appeal are *not* appealable orders under section 904.1. (*Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 985, fn. 1.) Furthermore, the record in this appeal does not contain an order or judgment dismissing Smith's petition to set aside the Order that might provide a basis on which we could *save* Smith's appeal. (*Ibid.*) However, rather than dismissing Smith's appeal, we elect to address the merits of his "appeal" by exercising our discretion to consider his appeal as a petition for writ of mandate. (*First Western Development Corp. v. Superior Court* (1989) 212 Cal.App.3d 860, 863, fn. 2; *Olson v. Cory* (1983) 35 Cal.3d 390, 400-401.)

II

Vexatious Litigants Generally

Section 391, subdivision (b)'s definition of a "vexatious litigant" includes a person who:

"(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined[; or]

"(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts

unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

Section 391, subdivision (a) defines "litigation" as "any civil action or proceeding, commenced, maintained or pending in any state or federal court."

"The vexatious litigant statute (§§ 391-391.7) was enacted in 1963 to curb misuse of the court system by those acting in propria persona who repeatedly relitigate the same issues." (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1008.) "The vexatious litigant statute authorizes a 'defendant' to bring a motion to require a 'plaintiff' to furnish security. Defendant must prove that the plaintiff is a 'vexatious litigant' and that there is no reasonable probability that plaintiff will prevail in the litigation. (§ 391.1.) The statute contemplates a hearing to determine whether the plaintiff qualifies as 'vexatious' (§ 391.2) and instructs the court to require security if it finds plaintiff has no reasonable probability of prevailing. . . . If security is not furnished as ordered, the 'litigation' shall be dismissed as to the 'defendant for whose benefit it was ordered furnished.' (§ 391.4.)" (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1215, fn. omitted.)

"Section 391.7, added in 1990 (Stats. 1990, ch. 621, § 3, pp. 3072-3073), furnished the courts an additional resource for addressing vexatious litigant problems. This newer section operates beyond the pending case and affects the litigant's future filings. It authorizes a court to 'enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed.' (§ 391.7, subd. (a).) [¶] When a prefiling order is in force, '[t]he presiding judge

shall permit the filing of such litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. . . . The clerk of any court issuing a prefiling order is to provide a copy of such order to the Judicial Council [of California], which maintains and disseminates annually a list of persons subject to such orders. (§ 391.7, subd. ([e])).)" (*McColm v. Westwood Park Assn.*, *supra*, 62 Cal.App.4th at p. 1216, fns. omitted.) "The [section 391.7] prefiling order component of the vexatious litigant statute is a necessary method of curbing those for whom litigation has become a game." (*Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 60.) "Section 391.7 does not deny the vexatious litigant access to the courts, but operates solely to preclude the initiation of meritless lawsuits and their attendant expenditures of time and costs. [Citation.] Vexatious litigant statutes are constitutional and do not deprive a litigant of due process of law. [Citations.]" (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 221-222.)

"A court exercises its discretion in determining whether a person is a vexatious litigant. [Citation.] We uphold the court's ruling if it is supported by substantial evidence. [Citations.] On appeal, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment. [Citation.]" (*Bravo v. Ismaj*, *supra*, 99 Cal.App.4th at p. 219.)

III

Smith's Contentions

Smith contends the probate court erred by granting Seene's motion to require Smith, as a vexatious litigant, to furnish security under section 391.1 in the pending litigation and for a section 391.7 prefiling order prohibiting him from filing new litigation

in propria persona without first obtaining leave of the court in which that filing is proposed. Smith also challenges the court's entry of the section 391.7 prefiling order and subsequent orders relating to filing a motion for reconsideration.

A

Smith asserts the probate court erred by finding he is a "vexatious litigant" under section 391 because he is not a "plaintiff" and Seene is not a "defendant" under that statute. Section 391, subdivision (d) defines "plaintiff" for purposes of the vexatious litigant statute as "the person who commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained" Section 391, subdivision (e) defines "defendant" as "a person . . . against whom a litigation is brought or maintained or sought to be brought or maintained." In the circumstances of this case, there is substantial evidence to support the court's finding that Smith is a "plaintiff" and a "vexatious litigant" within the meaning of section 391. His instant petition to set aside the Order was filed *after* the Order had been affirmed on appeal and become final. By filing the instant petition, Smith in effect commenced or instituted litigation to collaterally attack a final order. As the petitioner in that litigation, he is a "person who commences, institutes or maintains a litigation" and therefore is a "plaintiff" within the meaning of section 391, subdivision (d). The fact that he filed his petition in the probate court under case number P176307, the original case number in which the Order was issued and Seene was the petitioner, does not preclude Smith's petition from constituting

separate litigation in which he is deemed the plaintiff.³ Furthermore, the fact that Smith's petition and certain court documents may have referred to him as a defendant is not determinative of his status under section 391. Rather, in determining whether Smith was a "plaintiff" and "vexatious litigant" under section 391, the probate court was free to disregard the various labels assigned to Smith in litigation documents and instead focus on the underlying substance and effect of his actions in that litigation. Similarly, the probate court was not bound by the trial court's finding in Smith's prior civil action (case no. GIC 793744) that Smith was not a vexatious litigant by denying Seene's section 391 motion in *that* prior litigation. On the contrary, in deciding Seene's instant section 391 motion, the probate court could have considered Smith's filing of the Complaint in *that* prior civil action collaterally attacking the final Order as evidence showing Smith is a vexatious litigant in *this* litigation. Accordingly, the probate court properly found Smith is a section 391 "plaintiff" in relation to his petition to set aside the Order.

Applying similar reasoning, we also conclude the probate court properly found Seene is a section 391 "defendant" in relation to his defense of Smith's petition to set aside the Order. Smith's petition was "brought or maintained" against Seene, as trustee of the Trust, thereby making Seene a "defendant" as defined in section 391, subdivision (e). Smith's petition was in effect separate litigation from the other matters in probate court case number P176307 because it collaterally attacked the Order that had become final.

³ Assuming arguendo that Smith's petition did not commence or institute litigation, it at least *maintained* litigation in case number P176307 despite the finality of the Order, making him a "plaintiff" under section 391, subdivision (d).

Because there is substantial evidence to support the probate court's findings that Smith is a "plaintiff" and Seene is a "defendant" under section 391 and Smith does not dispute that there is substantial evidence to support the other requirements for a finding that he is a "vexatious litigant," we conclude the probate court properly found Smith is a "plaintiff" and a "vexatious litigant" under section 391.⁴

Furthermore, because the probate court properly found Smith is a "plaintiff" and Seene is a "defendant" under section 391, we also reject Smith's arguments that Seene and Boyd, as Seene's attorney, committed fraud and perjury by referring to Smith as the plaintiff and Seene as the defendant in this litigation. We similarly reject Smith's arguments that Boyd violated rules of professional responsibility by referring to Smith as the plaintiff and Seene as the defendant or in taking other actions in this litigation.⁵

B

Smith also asserts the probate court erred by entering the section 391.7 prefiling order on May 15, 2003, on Judicial Council of California form MC-700 because the court

⁴ The probate court's May 6, 2003 written order expressly found Smith was a vexatious litigant as defined in section 391, subdivisions (b)(2) and (3), which require that a plaintiff either: (1) repeatedly relitigate or attempt to relitigate, in propria persona, any issue of fact or law that has been finally determined against the same defendant, or the validity of that determination; or (2) repeatedly file, in propria persona, unmeritorious motions, pleadings, or other papers or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

⁵ We also reject Smith's argument that Boyd, as Seene's attorney, committed fraud by not notifying him of the April 23, 2003 continuance of the hearing of Smith's matter until July 9, 2003. Smith does not carry his appellate burden to show that Boyd owed him a duty to inform him of that continuance or that he suffered prejudice from a purported breach of that duty.

clerk purportedly completed that form. However, Smith misconstrues that form and the probate court's May 6 written order. The form does *not* state that only the party making the section 391.7 motion can complete the form for submission to the court for its execution. Rather, the language to which Smith refers suggests only that the top left portion of that form need be completed if an attorney or party without an attorney has made the section 391.7 motion. That portion of the form provides a space in which the name and address of the attorney or party without an attorney may be stated. Within that space, the following parenthetical language instructs: "(To be completed only if a party is making the motion)." That language does *not* prohibit the court clerk from completing that, or any other, part of form MC-700 when a section 391.7 motion is made by an attorney or a party without an attorney. Accordingly, assuming the probate court clerk completed the form MC-700, which was then signed by the probate court and entered on May 15, that action did not constitute error. Furthermore, to the extent Smith asserts the form MC-700 prefiling order was entered in error because the probate court did not award Seene the section 391.7 prefiling order at the April 22 hearing, the court's May 6 written order following that hearing clearly awarded that relief to Seene, which relief the court noted (and the record shows) Seene had requested in his section 391 motion.

Although Smith apparently argues the probate court erred by denying his May 16 and June 4 requests to file a motion for reconsideration, he does not carry his appellate burden to present a substantive legal argument showing the manner or substance of the

purported errors. Accordingly, we deem Smith to have waived his challenge to those rulings by the court.⁶

DISPOSITION

The petition for writ of mandate is denied. Real party in interest is entitled to costs in this writ proceeding.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.

⁶ Smith also has not presented any comprehensible, substantive legal argument in support of his assertions that: (1) Boyd's "trickery, fraud, deceit[,] perjury and misrepresentation" in the probate court resulted in his vexatious litigant status, which barred his appeal in probate court case number P176307; and (2) various Probate Code sections support his challenge to the probate court's decisions. Accordingly, we also deem Smith to have waived those assertions.